"All that this court has ever held is that poverty or inability to pay is a special circumstances, and, where it exists the court must consider whether in the particular case it will order security to be given. The court is not bound in such a case to order security to be given. It has a discretion in the matter which it has exercised on many occasions".

The matter is therefore a question of discretion for the court.

It may well be that the defendant is in a state of doubtful solvency. But the matter must be resolved at the earliest opportunity, *i.e.* when the notice of appeal was given. Beyond saying in his affidavit that the defendant has appealed the respondent for some inexplicable reason has not disclosed the date the notice of appeal was given. A perusal of the Court Registry file reveals 4th September 1973 was the date, that is some 8 days after judgment was delivered.

In ordinary circumstances the respondent ought to confront the defendant by letter to give security. If there is no adequate response, then the respondent may apply to Court. In this case the matter was first raised at the time when an application for stay was made, that is 26 days after lodging the notice of appeal. The application for further security was made on 10th October 1973, that is 14 days after the matter was first raised in court, and 40 days after lodging of notice of appeal.

Having regard to all the circumstances of the case, I feel this is not a fit case to order further security for costs of the appeal. There was no prior demand for security and the motion was not made at the earliest opportunity.

The motion is dismissed with costs.

Azmi L.P. and **Ali F.J.** concurred.

Motion dismissed.

Solicitors: *Wilson & Co.; Wrigglesworth & Co.*

MAT v. INSPECTOR-GENERAL OF POLICE, MALAYSIA & ANOR.

[F.C. (Azmi L.P., Ali and Raja Azlan Shah F.JJ.) February 5, 1974]

[Penang — Federal Court Criminal Appeal No. 24 of 1973]

Administrative Law — Habeas Corpus — Detention — Restriction Order — Subsequent order cancelling the earlier restriction order — Service of order — Whether person should be released before new restriction order is served on him — Criminal Procedure Code (F.M.S. Cap. 6), s. 35 — Emergency (Public Order and Prevention of Crime) Ordinance, 1969.

In this case the appellant had originally be detained by the police under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. Subsequently a restriction order was made by the Minister for Home Affairs against the appellant. This order was dated the 6th August, 1973 but the Minister had in fact died on the 2nd August, 1973. On the 21st August, 1973, the Minister for Home Affairs made an order cancelling the earlier restriction order and he also made a new restriction order. The appellant applied for a writ of *habeas corpus* on the grounds that the original restriction order was illegal and that the illegality had not been cured by the subsequent restriction order. The High Court dismissed the application and the appellant appealed to the Federal Court. It was argued on the appeal (a) that the order cancelling the earlier restriction order had not been served on the appellant and (b) the appellant should have been released from custody on the service of the cancellation order before the new restriction order could be served on him.

Held: (1) on the facts the order cancelling the original restriction order had been properly served on the appellant;

(2) as the new restriction order was in substitution for the previous restriction order, it would be an empty formality to release the appellant on the service of the cancellation order in order to serve the new restriction order.

Cases referred to:-

(1) *Re Mohan Kumaramangalam* A.I.R. 1951 Mad. 583.

(2) *Godavari* v. *State of Maharashtra* A.I.R. 1964 S.C. 1128.

FEDERAL COURT.

Karpal Singh for the appellant.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Azmi L.P. (read by **Raja Azlan Shah F.J.**): This is an appeal against the judgment of the High Court dismissing appellant's motion for a writ of *habeas corpus*.

The following facts appear from the affidavits of the appellant and of A.S.P. Haji Junid bin Haji Abdul Aziz — The appellant was arrested on 8th June 1973 and ordered to be detained for 60 days by the police officer in exercise of powers conferred upon him by section 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The period of 60 days is the maximum allowed for the detention of a person if the detention order is made by a police officer, and in this case the detention period expired on 6th August 1973. The Minister for Home Affairs may under section 3(3) extend the period of detention for 2 years. The Minister, however, in this case instead of extending the detention period made a restriction order on the appellant in exercise of powers given him by section 4A for a period of 2 years from the date of the order.

This restriction order was signed by Tun (Dr.) Ismail as the Minister for Home Affairs and bore the legend "bertarikh pada 6hb Ogos 1973" just above the Minister's signature. There was no suggestion made that the signature was not genuine, but since the Minister died on 2nd August 1973, he must have signed the restriction order on the 2nd August 1973 or before that date.

The Minister of Home Affairs, Tan Sri Mohamed Ghazali who succeeded Tun (Dr.) Ismail made two orders both bearing the date 21st August 1973: —

(1) an order cancelling the restriction order made by Tun (Dr.) Ismail, and

(2) a restriction order against the appellant for a period of two years with effect from the date of the order.

This restriction order hereinafter referred to as Tan Sri Ghazali's "restriction order" contained restrictions and conditions similar to those found in the previous restriction order made by Tun (Dr.) Ismail.

On 20th August 1973, the appellant moved the High Court for a writ of *habeas corpus* for his release on the following grounds: —

(1) that the restriction order signed by Tun (Dr.) Ismail had been amended subsequent to the signing of the order by altering the figure '8' to figure '6' in the legend "bertarikh pada 6hb Ogos 1973."

It was also said this was done without further authority.

(2) that the illegality of the restriction order signed by Tun (Dr.) Ismail was not cured by the subsequent restriction order signed by Tan Sri Ghazali.

The High Court rejected the appellant's contention and dismissed the motion. Against that order the appellant appealed to this court on three grounds: —

(1) The learned judge erred in law in not considering that the provisions of section 4A(3) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 had not been complied with in that the original order of the Minister for Home Affairs, Malaysia, Tan Sri Mohamed Ghazali bin Shafie, dated 21st August 1973 purporting to cancel the original restriction order under the hand of the late Tun (Dr.) Ismail bin Dato' Haji Abdul Rahman purportedly dated 6th August 1973 had not been served on the appellant. That being so the original restriction order was in force. The learned judge failed to conclude that the appellant's restriction and consequent deprivation of his liberty was unlawful as the figure '6' is a superimposition over the figure '8' which has been erased both in the original restriction order and the accompanying statement rendering the said order bad on its fact;

(2) The learned judge further failed to consider that the original restriction order not having been validly cancelled there were two restriction orders (purportedly dated 6th August 1973 and 21st August 1973 respectively) in effect and the appellant was subsequently subject to "double detention" which would be unlawful in law) and

(3) The learned judge erred in law in not considering that even assuming the original restriction order purportedly dated 6th August 1973 had been lawfully cancelled the appellant should first have been released before restriction under the fresh restriction order dated 21st August 1973.

The first ground alleged that the order made by Tan Sri Ghazali cancelling the restriction order made by Tun (Dr.) Ismail has not been served on him. I will hereafter refer to the order made by Tan Sri Ghazali as the "cancelling order."

A.S.P. Haji Junid stated as follows in his affidavit: —

"I on the 24th day of August 1973 at Kodiang, Jitra served the original and the copy of Exhibit 'B' on the said Mat @ Mat Ali Penyamun bin Ali.

The said Mat @ Mat Ali Penyamun bin Ali accepted them. I then explained in the National Language the contents of the Exhibit 'B' to him.

The said Mat @ Mat Ali Penyamun bin Ali said that he understood my explanation and then he signed the Exhibit 'B'.

I then took custody of Exhibit 'B' and left with him the copy."

Exhibit "B" referred to above was the cancelling order. The Ordinance does not define the word "serve" or set out how service of such orders should be effected.

But it would appear to us that A.S.P. Haji Junid in serving the two orders on the appellant had adopted the procedure laid out in section 35 of the Criminal Procedure Code (F.M.S. Cap. 6) for service of criminal summons. Section 35 reads as follows: —

"35(i) The summons shall if practicable be served personally on the person summoned by showing him the original summons and by tendering or delivering to him a copy thereof under the seal of the court.

(ii) Every person on whom a summons is so served shall if so required by the serving officer sign receipt of the copy thereof on the back of the original summons."

It was also contended that the copy delivered to the appellant was not signed by the Minister. It would have been better if the copy handed to the appellant had also been signed by the Minister but the fact that the copy was not signed or certified to be true, in our view, in the circumstances of the case, did not make the service ineffective. There is for instance no allegation that the copy handed over to the appellant was different from the original signed by the Minister. We would therefore conclude that the cancelling order has been properly served and therefore effective. It would appear from the affidavit of A.S.P. Haji Junid that he had served Tan Sri Ghazali's restriction order in the same manner. There is, however, no complaint in the service of this restriction order. Since in our view the cancelling order had been properly served the second part of the first ground must necessarily fail. Similarly the second ground of appeal also failed.

In reference to the third and last ground, it was contended that the appellant should be released from custody on the service of the cancellation order before Tan Sri Ghazali's restriction order could be served on him. Counsel cited two Indian cases. This contention would have some support by the judgment of a Madras court reported as *re Mohan Kumaramangalam.*[1] In this case a person was arrested in Bombay by the Commissioner of Police and was served with a detention order. At the request of the Madras Government he was transferred to Madras and was detained under an order issued by the Madras Government. It was held that the detainee should have been released after the cancellation of the Bombay order before the Madras order was served on him. A contrary view was held, however, by the Supreme Court in the case of *Godavari* v. *State of Maharashtra.*[2] In this case a person was detained by an order of the Police Commissioner. The order was sent to the State Government for approval as required by the Preventive Detention Act. The State Government revoked the order of the Police Commissioner and on the same day passed an order under rule 30 of the Defence of India Rules. The latter order was served on the detainee in gaol. The legality of the order was challenged on the ground that it was served while the detainee was in gaol. The Supreme Court held that the order was legal. Wanchoo J. (as he then was) delivering the judgment of the court at page 1132 said: —

"In these circumstances it would be in our opinion an empty formality to allow the appellants to go out of jail on the revocation of the order (made by the Commissioner) and to serve them with the order (made by the State Government) as soon as they were out of jail."

It is obvious Tan Sri Ghazali's restriction order was actually in substitution of the previous restriction order and was made for the same reason that the previous order was made. We would therefore say that it would be an empty formality to release the appellant on the service of the cancellation order in order to serve on him Tan Sri Ghazali's restriction order.

We would therefore say this ground must also fail.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

LIM PIT SENG & ORS. v. LAI NGION SIEW & ORS.

[F.C. (Azmi L.P., Suffian C.J. and Ong Hock Sim F.J.) February 9, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 120 of 1973]

Tort — Negligence — Fire started on land spreading to neighbouring land — Rubber land — Dangerous operation — Person starting fire liable.

In this case the plaintiffs had brought an action against the defendants claiming that fire which damaged their rubber trees land had, owing to the negligence of the defendants, spread from fire started by them on their lands. On the facts it appeared that the fire was started by the first defendant on lands belonging to the other defendants.

Held: (1) a person who starts a fire on land belonging to another is liable in damages if through his or his servant's negligence that fire spreads to a neighbouring land and the learned judge was right in holding that the first defendant was liable;

(2) the second and third defendants were liable as the owners of the lands from which the fire had started and had spread through the negligence of the first defendant, their agent;

(3) the operation of burning off for replanting in a rubber small holding, when every tree is cut down, heaped up and left to dry before being set on fire is an operation necessarily attended with great danger, because the fire may readily spread to adjoining property and cause serious damage, and the person who executes such an operation is bound to use all reasonable precautions to prevent the fire spreading, otherwise he will be responsible for the consequences.

Cases referred to:-

(1) *Leong Bee & Co.* v. *Ling Nam Rubber Works* [1970] 2 M.L.J. 45.

(2) *Black* v. *Christchurch Finance Company* [1894] A.C. 48, 54.

FEDERAL COURT.

N. Ramachandran for the appellant.

Gurdial Bakan Singh for the respondents.

Suffian C.J.: (delivering judgment of the Court): On 27th February, 1968, Lai Piang Nam (the second plaintiff) went to his rubber smallholding Lot 1090 at Titi and found the rubber trees on it blackened and smouldering. To get there he had to pass through rubber land Lot 196 belonging to Yap Foo Kiew (the fourth plaintiff) and he noticed that the rubber trees on that lot too were blackened and smouldering. He further noticed that the rubber trees on neighbouring lots 1089 and 1091 belonging to the third and fourth plaintiffs had also been affected by fire.

In evidence the second plaintiff said that it had been dry for a few days before the fire.

The four plaintiffs sued the owner of each of four neighbouring lands, claiming that the fire which damaged their trees had, owing to the negligence of the defendants, spread from a fire started by them on their lands.

At the outset it should be observed that this is not a case where it is alleged that a fire had started accidentally on the defendants' lands as in *Leong Bees'* case,[1] but one where it had been started there deliberately.

The law applicable has been succinctly stated by the Privy Council in *Black* v. *Christchurch Finance Company*[2] at page 54 as follows:

"The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property . . . , and if he authorizes another to act for him, he is bound not only to stipulate that such precaution shall be taken but also to see that these are observed; otherwise he will be responsible for the consequences."

Thus the issues here are: first, did the defendants start a fire on their lands, and secondly, did that fire spread to the plaintiffs' lands owing to the defendants' negligence?

The learned trial judge found each of the four defendants liable, and they appeal to us.

In our judgment there was no evidence whatsoever that there was any fire on Lot 1294 belonging to the fourth defendant and we would therefore allow the appeal by him. There were indeed signs of a fire in the area bordering that lot and Lot 196 belonging to the fourth plaintiff, but there was no evidence whatsoever that the fire which caused that damage had in any way originated from the fourth defendant's land.

We now turn to the appeals by the other three defendants.

It was not disputed that there had been a fire on Lot 1296 belonging to the second defendant and on the adjacent Lot 1295 belonging to the third defendant. It was not disputed either that there had been a fire on each of the plaintiffs' lands.

The plaintiffs called among others their star witness Lai Tee (PW5). This witness said that he had been employed by the first defendant beginning on 2nd February, 1968, and was still working for him on 26th February, to pile up in heaps and burn off old rubber trees which had been cut down on Lot 1296 belonging to the second defendant and on Lot 1295 belonging to the third defendant. It is not disputed that these two lots were being made ready for replanting. Equally it was not disputed that the first defendant was the grandfather of the second defendant and the father of the third and fourth defendants.

Lai Tee further said that the heaped up trees were two or three feet from Lot 196, that he worked on 26th February until 2.30 p.m., that before going